

2007

## Recent Developments in NAFTA Law

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### Recommended Citation

Jonathan L. Howell, *Recent Developments in NAFTA Law*, 13 LAW & BUS. REV. AM. 253 (2007)  
<https://scholar.smu.edu/lbra/vol13/iss1/15>

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# RECENT DEVELOPMENTS IN NAFTA LAW

*Jonathan L. Howell\**

## I. INTRODUCTION

CHAPTER 19 of the NAFTA creates an alternative mechanism to judicial review for antidumping and countervailing duty cases between two NAFTA countries.<sup>1</sup> Accordingly, when a petitioning foreign entity requests a review under Chapter 19, an independent binational panel acts in the place of national courts and decides whether a previous adverse determination conforms to the antidumping or countervailing duty laws of the determining country.<sup>2</sup> Already, since the beginning of 2006, several petitioners have requested that the binational panel review several matters.<sup>3</sup> This article serves as a brief overview of the binational panel's review of such matters and its subsequent decisions occurring between January 2006 and July 2006.

## II. *MAGNESIUM FROM CANADA*: DECISION OF THE PANEL REVIEWING THE DECISION OF THE INTERNATIONAL TRADE COMMISSION ON REMAND (JAN. 17, 2006)

In *Magnesium from Canada*, the U.S. International Trade Commission (the Commission) decided not to revoke an antidumping order and a countervailing duty order banning the importation of magnesium from Canada, contending that revocation would likely lead to a continuation or recurrence of material injury to the U.S. oil industry.<sup>4</sup> The Government of Quebec and Magnola Metallurgy Inc. (Magnola) responded to the Commission's determination by requesting a binational panel review,

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1. North American Free Trade Agreement, Article 1904; NAFTA Panel Reviews; Notice of Panel Decision, 71 Fed. Reg. 56 (Mar. 23, 2006). See North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289, 386 (1993) [hereinafter NAFTA].
2. 71 Fed. Reg., *supra* note 1, at 56.
3. See NAFTA SECRETARIAT, DECISIONS & REPORTS, [http://www.nafta-sec-alena.org/DefaultSite/index\\_e.aspx?DetailID=76](http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=76) (last visited Sept. 22, 2006).
4. *In re Magnesium from Can.* (U.S. v. Can.), File No. USA-CDA-00-1904-09, 71 Fed. Reg. 3,469 (Jan. 17, 2006), available at [http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA\\_Chapter\\_19/USA/ua00091e.pdf](http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_19/USA/ua00091e.pdf).

pursuant to Chapter 19.<sup>5</sup> On July 16, 2002, the binational panel reviewed the matter and remanded the Commission's determination.<sup>6</sup> In doing so, the panel instructed the Commission to: (1) examine whether nonsubject imports would materially injure the domestic industry; and (2) present the price and volume implications of revoking the orders on pure magnesium and alloy magnesium.<sup>7</sup> After the panel remanded the matter, the Commission again determined that nonsubject goods were not commercially suitable for the Canadian or domestic product and that revoking the orders would lead to a continuation or recurrence of material injury.<sup>8</sup>

On January 17, 2006, the binational panel examined the Commission's latter determination and affirmed the determination in part and remanded in part.<sup>9</sup> Specifically, the panel affirmed the Commission's decision concerning nonsubject goods, stating that the Commission met its burden by providing more than a substantial showing in support of its position.<sup>10</sup> The panel also affirmed the Commission's determination regarding the price and volume implications of pure magnesium, despite the Commission's failure to present the price and volume implications for revoking the orders.<sup>11</sup> Although the Commission failed to present these implications, the panel found the Commission presented a detailed assessment of its reasoning, which included past records of dumping and receipts of countervailing subsidies, as well as Magnola's expected pricing points upon entry into the domestic market.<sup>12</sup> In examining the Commission's determination concerning the price and volume implications of alloy magnesium, however, the panel remanded the matter back to the Commission.<sup>13</sup> The panel reasoned that the Commission failed to support its conclusion (that revocation would likely lead to continuation or recurrence of material injury) based on evidence, such as price and volume analysis and other factors not yet examined.<sup>14</sup>

### III. *OIL COUNTRY TUBULAR GOODS FROM MEXICO*: FINAL RESULTS OF ANTIDUMPING DUTY ADMINISTRATIVE REVIEW AND DETERMINATION NOT TO REVOKE (JAN. 27, 2006)

In *Oil Country Tubular Goods from Mexico* (Jan. 27, 2006), the U.S. Department of Commerce (the Department) imposed an antidumping order on oil country tubular goods from Mexico.<sup>15</sup> As a result, two Mexi-

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5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *In re Oil Country Tubular Goods from Mex.* (U.S. v. Mex.), File No. USA-MEX-01-1904-05, 71 Fed. Reg. 5,645 (Jan. 27, 2006), available at <http://www.nafta-sec>

can companies, Tubos de Acero de Mexico S.A. (TAMSA) and Hylsa S.A. de C.V. (Hylsa), challenged the order. After a five-year review (the "sunset review"), the Department determined that the antidumping duties imposed on TAMSA and Hylsa should remain in effect because neither company met the commercial quantity threshold for revocation.<sup>16</sup> Consequently, both TAMSA and Hylsa requested a binational panel to review the Department's determination not to revoke the order.<sup>17</sup> In making this request, TAMSA argued that the panel should overturn the determination because the Department wrongfully applied the commercial quantities requirement when determining not to revoke the order.<sup>18</sup> In addition to TAMSA's arguments, Hylsa presented three reasons why the Department wrongfully determined antidumping order should not be revoked: (1) the Department incorrectly classified the export insurance Hylsa purchased as a direct selling expense; (2) the Department unreasonably applied different prices for the two sizes of oil country tubular goods produced; and (3) the Department calculated the dumping margins using the practice of zeroing (i.e., treating a negative dumping margin as zero).<sup>19</sup>

On January 27, 2006, the binational panel upheld the Department's determination that TAMSA did not meet the commercial quantity threshold.<sup>20</sup> As for Hylsa, the panel upheld the Department's classification of export insurance as a direct selling expense.<sup>21</sup> Likewise, the panel found the Department's position that zeroing does not violate U.S. law.<sup>22</sup> The panel, however, remanded the matter for final determination on the issue of production cost for the two sizes of tubular goods with instructions to average the costs and recalculate the constructed value.<sup>23</sup>

#### IV. OIL COUNTRY TUBULAR GOODS FROM MEXICO: FINAL RESULTS OF SUNSET REVIEW OF ANTIDUMPING ORDER (FEB. 8, 2006)

In *Oil Country Tubular Goods from Mexico* (Feb. 8, 2006), the Department imposed an antidumping order barring importation of oil country tubular goods from Mexico.<sup>24</sup> As a result, TAMSA challenged the order, contending it should be revoked.<sup>25</sup> But, after the sunset review, the De-

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alena.org/app/DocRepository/1/Dispute/english/NAFTA\_Chapter\_19/USA/ua01050e.pdf.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *In re Oil Country Tubular Goods from Mex. (U.S. v. Mex.)*, File No. USA-MEX-2001-1904-03, 71 Fed. Reg. 7,740 (Feb. 3, 2006), available at [http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA\\_Chapter\\_19/USA/ua01031e.pdf](http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_19/USA/ua01031e.pdf).

25. *Id.*

partment determined not to allow the antidumping order to remain in effect, opining that revocation would likely lead to the continuance, or recurrence, of dumping.<sup>26</sup> Consequently, TAMSA requested a binational panel review of the Department's determination not to revoke the order, pursuant to the panel's authority under Chapter 19.<sup>27</sup>

On February 8, 2006, the binational panel reviewed the Department's previous determination and remanded the matter with further instructions.<sup>28</sup> Specifically, the panel instructed the Department to determine whether the decrease in TAMSA's foreign currency denominated debt in the sunset review period outweighs the "likelihood" presumption that results from the decrease in TAMSA's post-order exports" and, if so, why.<sup>29</sup> The panel further directed the Department to enter a finding of no likelihood if the Department determines the lower level of TAMSA's foreign currency denominated debt outweighs the "likelihood" presumption" resulting from the decrease in TAMSA's post-order exports.<sup>30</sup>

#### V. *SOFTWOOD LUMBER*: FINAL AFFIRMATIVE COUNTERVAILING DUTY DETERMINATIONS (MAR. 17, 2006)

In *Softwood Lumber*, the Department imposed a countervailing duty order barring the importation of Canadian Softwood Lumber.<sup>31</sup> As a consequence, the Government of Canada and several of its provinces (the Petitioners) challenged the Department's decision, arguing that the order should be revoked.<sup>32</sup> Notwithstanding this challenge, the Department determined that the order should remain in effect.<sup>33</sup> The Petitioners then requested a binational panel review of this determination, pursuant to Chapter 19.<sup>34</sup> Since this initial request, the binational panel has remanded this matter back to the Department on several occasions, each time instructing the Department on the proper starting point for calculating benchmark prices and Crown stumpage fees.<sup>35</sup> Most recently, on October 5, 2005, the binational panel remanded the matter back to the Department with instructions to: (1) fix log seller profit at C\$4.34; (2) refrain from apportioning log seller profit; and (3) adjust profit figures for Ontario, Manitoba, and Saskatchewan to the extent such figures are de-

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26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *In re* Certain Softwood Lumber Prods. from Can. (U.S. v. Can.), File No. USA-CDA-2002-1904-03, 71 Fed. Reg. 14,683 (Mar. 17, 2006), available at [http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA\\_Chapter\\_19/USA/ua02035e.pdf](http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_19/USA/ua02035e.pdf).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

rivative of the profit figure for Quebec.<sup>36</sup> On remand, the Department expressly disagreed with the panel's rejection of its apportionment theory, under which only part of the C\$4.34 profit figure was attributed to the log seller, and the balance was allocated to the timber owner.<sup>37</sup> In contrast, the Petitioners argued that: (1) the use of the same private timber prices to determine the adequacy of remuneration in a log-based benchmark "would be contrary to the doctrine of 'law of the case;'" (2) the Department must account for the log export restraints imposed by the applicable province; and (3) the Department has indicated it does not intend to revoke the countervailing duty order *ab initio*.<sup>38</sup>

On March 17, 2006, the binational panel examined the Department's determination on remand.<sup>39</sup> The panel refused to consider the issues of apportionment and the use of import blend and private prices because these issues had already been dealt with at length in previous decisions.<sup>40</sup> Therefore, the panel refused to give these issues further consideration.<sup>41</sup> Likewise, the panel chose not to address the impact of export restraints because it was not at issue in the previous remand orders.<sup>42</sup> Nevertheless, the panel upheld the Department's remand determination, stating that "whatever views the [p]anel may have of the [Department's] position, the [p]anel is constrained to assume that the Department will correctly follow the law."<sup>43</sup>

#### VI. *OIL COUNTRY TUBULAR GOODS FROM MEXICO: FINAL RESULTS OF SUNSET REVIEW OF ANTIDUMPING DUTY ORDER (JULY 28, 2006)*

In *Oil Country Tubular Goods from Mexico* (July 28, 2006), the Department imposed an antidumping order barring the importation of oil country tubular goods from Mexico.<sup>44</sup> TAMSA subsequently challenged the order, contending the order should be revoked.<sup>45</sup> But the Department determined the antidumping order should remain in effect based on its belief that revocation of the order would likely lead to the continuance, or recurrence, of dumping.<sup>46</sup> In response, TAMSA requested a binational panel review of the Department's determination under Chapter 19.<sup>47</sup> On February 3, 2006, the binational panel remanded the matter

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36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *In re Oil Country Tubular Goods from Mex. (U.S. v. Mex.)*, File No. USA-MEX-01-1904-05, 71 Fed. Reg. 45,773 (Aug. 11, 2006), available at [http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA\\_Chapter\\_19/USA/ua01051e.pdf](http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_19/USA/ua01051e.pdf).

45. *Id.*

46. *Id.*

47. *Id.*

back to the Department with instructions.<sup>48</sup> Approximately one month later, the Department filed its second redetermination on remand.<sup>49</sup> Yet TAMSA disagreed with the Department's second redetermination, arguing the following three points: (1) it placed in doubt the role of the peso devaluation and TAMSA's level of indebtedness in the original dumping determination; (2) it was unclear in terms of the Department's views as to whether TAMSA significantly reduced its indebtedness during the sunset period; (3) it did not clearly explain the purpose for the recalculation of the financial expenses ratios from the different periods; and (4) it engaged in the selective incorporation of information into the record to support the Department's statements.<sup>50</sup>

On July 28, 2006, the binational panel reviewed the Department's second redetermination.<sup>51</sup> The panel concluded that the Department's likelihood determination was unreasonable and not in accordance with the law, and that the Department on remand must either issue a determination of no likelihood or give an analysis to support a conclusion that TAMSA's dumping is likely to continue or recur.<sup>52</sup> The panel reasoned that the Department was directed to reconsider its determination with such finality because it failed to: (1) explain why TAMSA's high financial expense ratio is likely to recur; (2) support its likelihood determination in light of the other factors presented; and (3) consider the decrease in TAMSA's foreign currency denominated debt.<sup>53</sup> Accordingly, the panel remanded the matter and directed the Department to issue its final determination on remand within twenty days.<sup>54</sup>

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48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

# **Documentation**

